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Supreme Court, U.S.
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No. _____

# In the Supreme Court of the United States

SUZANNE D. KOCAK,

*Petitioner*,

v.

COMMUNITY HEALTH PARTNERS OF OHIO, INC.,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Petitioner, who resigned her employment because of a complicated pregnancy that caused alterations of her scheduled hours, established that her application for reemployment was denied, in part, because of stated concerns she might become pregnant again and cause scheduling difficulties. Statements were uttered following the submission of her application that she might have another complicated pregnancy and cause scheduling problems. The reasons proffered by her former employer for denying her application were that she was perceived as selfish by her former co-workers and disliked by them. The district court granted summary judgment on petitioner's claim of pregnancy discrimination holding the statements related to the apprehension of another pregnancy was not direct evidence of sex or pregnancy discrimination because she was not pregnant at the time she sought reemployment. The court of appeals determined the district court erred because discrimination based on potential pregnancy is prohibited. It affirmed, however, because it found there was unrefuted evidence that petitioner was difficult to contact during her employment and there were difficulties in scheduling her hours. It thus determined that petitioner's evidence was not direct for that reason. Assuming the statements were direct evidence of discrimination, the court of appeals further held that petitioner's claim failed because she did not establish that the reasons proffered by the employer were pretextual.

The questions presented are as follows:

1. Whether the classification of petitioner's evidence as direct evidence was nullified by evidence that she had difficulties related to her scheduled hours and was difficult to contact?

2. Whether, in the face of direct evidence, petitioner had to show pretext in order to establish a claim of sex or pregnancy discrimination?

## PARTIES TO PROCEEDING

The parties to this proceeding are listed in the caption of this matter.

## RULE 29.6 STATEMENT

Petitioner is an individual. No corporate disclosure statement is required.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Suzanne Kocak ("Kocak") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as *Kocak v. Community Health Partners of Ohio, Inc.*, 400 F.3d 466 (6th Cir. 2005). (App. at 3a-13a). The court of appeals affirmed the November 25, 2003 decision of the United States District Court for the Northern District of Ohio, Eastern Division. (App. at 16a-32a).

Petitioner's petition for rehearing *en banc* filed with the court of appeals on March 17, 2005 was denied, without opinion. Order issued May 17, 2005. (App. at 1a-2a).

## JURISDICTION

The court of appeals issued its opinion on March 11, 2005 and its order denying rehearing on May 17, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-2(a)(1) provides, in part, that "[i]t shall be an unlawful employment practice for an employer ... to fail or refuse to hire ... any individual ... because of such individual's race, color, religion, sex, or national origin."

In pertinent part, 42 U.S.C. § 2000e(k) states that the "terms, 'because of sex' or 'on the basis of sex' include, but

are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."

42 U.S.C. § 2000e-2(m) provides "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

42 U.S.C. § 2000e-5 (g)(2)(B) provides that "[o]n a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment described in subparagraph (A)."

These provisions have been reproduced in the appendix at F. (App. at 35a-38a).

## STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Sixth Circuit affirming a decision of the United States District Court for the Northern District of Ohio.

The gravamen of Kocak's claim arising under 42 U.S.C. § 2000e-2(a)(1) ("Title VII") is that she was denied

employment as a nurse on the basis that she might become pregnant again and cause scheduling difficulties for her employer. Specifically, her charge submitted with the Equal Employment Opportunity Commission ("EEOC charge") stated she had resigned her employment with Community Health Partners of Ohio, Inc. ("CHP") in January of 1999 because of a complicated pregnancy. A manifestation of her complicated pregnancy required the alteration of her working schedule. She sought reemployment with CHP in January of 2000 and, according to her EEOC charge, around June 1 of 2001. On both occasions she sought employment in the Women's and Children Department of CHP. On each occasion following the submission of her applications an Elizabeth Finnegan informed Kocak that she and Melanie Meyer, who was charged with hiring nurses in this department, had concerns that Kocak might have another complicated pregnancy and cause scheduling problems. Finnegan further informed Kocak that Meyer also stated she did not like how Kocak's former pregnancy affected scheduling in the past and that Meyer did not want to deal with that issue again. Finnegan uttered these statements when petitioner had inquired about the status of her applications. At the time these statements were uttered, Finnegan was the director of this department and Meyer was the manager thereof. Meyer had been Kocak's manager in 1999 when Kocak resigned.

Through Finnegan, CHP maintained that Kocak's application submitted in May of 2001 was denied because others who had worked with Kocak informed Finnegan they did not view Kocak as a team player. They also stated Kocak put her own interest ahead of her patients and co-workers. While not clear when Finnegan was informed of these concerns, CHP's records show that Meyer denied consideration of Kocak's application a day after it was

submitted. The application was submitted on May 3, 2001 and Meyer denied consideration thereof on May 4, 2001.

Petitioner filed her complaint in the United States District Court for the Northern District of Ohio on October 11, 2002 seeking relief under Title VII for the denial of her application submitted in May of 2001.[1] On October 1, 2003, CHP filed its Motion for Summary Judgment under Federal Rules of Civil Procedure 56 (the "Motion"). The district court entered its order on November 25, 2003 granting the Motion. The district court determined the statements uttered following petitioner's application in May of 2001 did not consist of direct evidence because Kocak was not pregnant at the time she sought reemployment.

Petitioner filed her appeal on December 12, 2003. The decision of the court of appeals was entered on March 11, 2005. It determined the district court erred as the capacity to become pregnant is protected under Title VII. It affirmed the grant of the Motion, however, finding that Kocak's evidence was not direct because the evidence was "unrefuted" that Kocak was unreliable in scheduling her hours and difficult to contact. It reasoned that "[t]o conclude that the obstetric unit manager's comment about scheduling difficulties relating to her last pregnancy demonstrates an anti-pregnancy animus and not a non-discriminatory concern about Kocak's past scheduling difficulties – difficulties extending further back than the pregnancy – requires an inference." *Kocak*, 400 F.3d at 470.

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[1] The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, based on the Title VII claim presented in the complaint.

Assuming Kocak's evidence was direct, however, it further determined that Kocak could not establish pretext. The court of appeals opined that CHP "offered substantial evidence that it decided not to rehire Kocak because she was an unreliable employee and was avidly disliked by her peers" and that Kocak did not offer evidence showing that these reasons were pretextual. *Id.* at 471. It concluded that summary judgment was proper as Kocak would not have been hired absent the discriminatory statements.

Petitioner timely filed her petition for rehearing *en banc* on March 17, 2005 addressing these determinations and the stated concerns that Kocak might have another complicated pregnancy and disrupt scheduling. On May 17, 2005 the court of appeals denied the petition for rehearing *en banc*, without opinion.

## REASONS FOR GRANTING THE PETITION

This petition for a writ of certiorari should be granted for two principal reasons. First, the decision of the court of appeals squarely contradicts the analysis of this Court regarding direct evidence and undermines the mandate of Congress in amending Title VII. As noted in an amendment to Title VII, where there's a nexus between the statements uttered and the employment decision, direct evidence exist and irrespective of countervailing factors motivating the decision. Secondly, and for like reasons, the court of appeals' decision conflicts with Congress' mandate that an employer cannot raise an affirmative defense to liability when direct evidence exist. This Court's guidance is needed to address these issues of national importance, issues that implicate federal law governing Title VII claims. It's also needed as the decision of the court of appeals regarding

petitioner's direct evidence conflicts with another circuit's analysis of direct evidence of pregnancy discrimination.

## I. THE RULING BELOW CONFLICTS WITH THIS COURT'S ANALYSIS OF DIRECT EVIDENCE AND THE MANDATES OF TITLE VII REGARDING SUCH EVIDENCE, MATTERS IMPLICATING IMPORTANT ISSUES OF FEDERAL LAW, AND FURTHER CONFLICTS WITH ANOTHER CIRCUIT'S ANALYSIS OF DIRECT EVIDENCE OF PREGNANCY DISCRIMINATION

Whether a woman who had to alter her hours of employment and was difficult to contact must negate the inference that the employer was motivated by those factors, and as a prerequisite to establishing direct evidence of sex or pregnancy discrimination, is an important question, implicating this Court's analysis in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and federal law codified at 42 U.S.C. § 2000e-2(m).

In *Price Waterhouse*, this Court stated that the words of 42 U.S.C. §§ 2000e-2(a)(1) and (2) prohibiting sex or gender discrimination "mean[s] that gender must be irrelevant to employment decisions." *Price Waterhouse*, 490 U.S. at 240. "When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was 'because of sex' and the other, legitimate considerations – even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account." *Id.* at 241.[2]

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[2] 42 U.S.C. § 2000e(k)(Pregnancy Discrimination Act or "PDA") defines the term "sex" to include women affected by pregnancy or

This Court then expounded on the nature of direct evidence. "In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman" [or an individual fearful of becoming pregnant]. *Id.* at 249. Whether one had previous difficulties with scheduling their hours of employment because of a complicated pregnancy, or was difficult to contact, is immaterial to the answer provided.

Consistent with this Court's analysis of direct evidence in *Price Waterhouse*, but in response to this Court's opinion permitting an employer to avoid liability by showing it would have made the same decision absent such evidence, Congress enacted 42 U.S.C. 2000e-2(m) as part of the amendments to the Civil Rights Act of 1991 ("1991 Act"). That provision provides "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

The legislative reports of this provision are instructive.

> In providing liability for discrimination that is a "contributing factor" the Committee intend[ed] to

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childbirth. This Court held that the PDA prohibits an employer from discriminating against a woman "because of her capacity to become pregnant." *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991).

> restore the rule applied by the majority of the circuits prior to the *Price Waterhouse* decision that any discrimination that is actually shown to play a role in a contested employment decision may be the subject of liability. Conduct or statements are relevant under this test only if the plaintiff shows a nexus between the conduct or statements and the employment decision at issue. For example, isolated or stray remarks not shown, under the standards generally applied for weighing the sufficiency of evidence, to have contributed to the employment decision at issue are not alone sufficient.

H.R. REP. 102-40 (II), 102nd Cong., 1st Sess., page 15. As noted in both the history and language of 42 U.S.C. § 2000e-2(m), liability exist where a nexus between the prohibited act and the employment decision is shown, and irrespective of "other factors" motivating the decision. Contrary to the analysis in *Kocak*, her direct evidence did not have refute the inference that CHP may have been motivated by matters surrounding her scheduled hours or inability to contact when it expressed an apprehension of another pregnancy. Its stated apprehension of another pregnancy was at least a factor in the challenged employment decision and was sufficient to show the required "nexus" warranting application of this statutory provision.

The court of appeals' analysis of petitioner's direct evidence of pregnancy discrimination also conflicts with law from another circuit on this issue. As noted by the United States Court of Appeals for the Fourth Circuit in *Wagner v. Dillard Department Stores, Inc.*, 17 Fed. Appx. 141 (4th Cir. 2001), "[i]n a mixed-motive case, a plaintiff must prove that the illegitimate factor – pregnancy, in this case – was 'a motivating factor for any employment practice, even though

other factors also motivated the practice.'" *Id.* at 147 (internal citations omitted). "Thus, in a mixed-motive case, 'employers ... violate the [1991] Act when [the illegitimate factor] plays an actual role in an employment decision, regardless of other considerations that may independently explain the outcome.'" *Id.*, citing *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995)(latter brackets original). "Thus, an employer cannot take adverse action against a pregnant employee [nor one who, in the employer's eye, might become pregnant] 'because it anticipated that she would be unable to fulfill its job expectations.'" *Wagner* at 149 (internal citation omitted).

As noted in *Wagner*, 42 U.S.C. § 2000e-2(m) clearly applies where it is apparent that one's pregnancy, or fear of becoming pregnant, plays a role in the challenged decision. The court of appeals' analysis regarding petitioner's direct evidence is contrary. To establish direct evidence petitioner's evidence had to negate the inference that CHP may have been motivated either by considerations of petitioner's past scheduling difficulties or the concomitant concern of fulfilling job expectations should she resume employment. The petition for rehearing *en banc* calling attention to the same, and the conflict with 42 U.S.C. § 2000e-2(m) this holding created, was denied. This petition thus follows.

## II. THE RULING BELOW CONFLICTS WITH CONGRESS' MANDATE THAT IN THE FACE OF DIRECT EVIDENCE OF EMPLOYMENT DISCRIMINATION AN EMPLOYER DOES NOT HAVE A DEFENSE TO AVOIDING LIABILITY.

Additionally, whether a claimant who has direct evidence of sex discrimination must also establish pretext, and as a prerequisite to establishing liability, is also an important question, implicating the dictate of federal law.

The court of appeals' requirement that petitioner had to show pretext to survive summary judgment squarely conflicts with the amendments to the 1991 Act. By virtue of its enactment of both 42 U.S.C. 2000e-2(m) and 42 U.S.C. § 2000e-5 (g)(2)(B), Congress made clear that the affirmative defense this Court recognized in *Price Waterhouse* is no longer applicable, particularly in the face of direct evidence. As stated by this Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), these amendments provide that "the employer has a limited affirmative defense that does not absolve it of liability, but restricts the remedies available to a plaintiff." *Id.* at 94.

The petition for rehearing *en banc* submitted with the court of appeals again called attention to this Court's decision in *Costa* as well as the amendments in the 1991 Act. Without explanation for this conflict, the petition was denied.

Thus, this Honorable Court should grant this petition, giving effect to this Court's analysis of direct evidence in *Price Waterhouse*, its analysis of the limited affirmative defense noted in *Costa* and, most importantly, the amendments in the 1991 Act. Petitioner believes she has rights to the protection of the law, as enacted by Congress,

and the court of appeals cannot abrogate those rights, other than by an Act of Congress.

## CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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## APPENDIX A

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 03-4650**

**[Filed May 17, 2005]**

SUZANNE D. KOCAK,
Plaintiff-Appellant,

v.

COMMUNITY HEALTH PARTNERS OF OHIO, INC.,
Defendant-Appellee.

BEFORE: SILER, SUTTON, and FARRIS,* Circuit Judges.

### ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. Jerome Farris, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

**ENTERED BY ORDER OF THE COURT**

/s/_____
Leonard Green, Clerk

## APPENDIX B

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 03-4650**

**[Filed March 11, 2005]**

| | |
|---|---|
| SUZANNE D. KOCAK, | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| COMMUNITY HEALTH PARTNERS | ) |
| OF OHIO, INC., | ) |
| Defendant-Appellee. | ) |
| | ) |

BEFORE: SILER, SUTTON, and FARRIS,* Circuit Judges.

Appeal from the United States District Court
for the Northern District of Ohio
at Cleveland
No. 02-02027
Patricia A. Gaughan, District Judge

* Hon. Jerome Farris, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation.

## OPINION

FARRIS, Circuit Judge. Whether one is or is not pregnant at the time does not control whether one can allege discrimination under the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), or section 4112 of the Ohio Revised Code. We nevertheless affirm the decision to enter summary judgment against Plaintiff Suzanne D. Kocak.

## I.

## *BACKGROUND*

The following facts are not in dispute: Kocak resigned from her position as an obstetric nurse at Defendant Community Health Partners of Ohio, Inc. by letter dated January 22, 1999. Pregnancy complications motivated her resignation. She delivered her child in March of 1999. She applied for a part-time nurse position with Community Health in January of 2000. She was not hired and did not file a charge of discrimination either with the Equal Employment Opportunity Commission or the Ohio Civil Rights Commission. She reapplied for a position as a part-time nurse in May of 2001. Her co-workers voiced vehement opposition to her rehiring, stating that they found her difficult to work with, unreliable, and not a "team worker." Kocak was not hired.

Certain disputed conversations and events in 2001 formed the basis of a charge of discrimination with the EEOC and OCRC in September 2001. In her deposition, Kocak testified that on June 4, 2001, Elizabeth Finnegan, a personnel manager at Community Health, asked Kocak whether she was pregnant or intended to have more children. Kocak also testified that Finnegan told her at an unspecified time

thereafter that Melanie Meyer, Kocak's former supervisor, would not rehire her because of the complications in scheduling caused by her past pregnancy.

On the basis of these 2001 events, Kocak filed a charge of discrimination with the EEOC and OCRC in September 2001, which states that the alleged discriminatory action – failure to hire – occurred in June 2001. Kocak received a right to sue letter from the OCRC on July 16, 2002, and this lawsuit followed.

## II.

## *STANDARD OF REVIEW*

We review the district court's entry of summary judgment de novo, *Farhat v. Jopke*, 370 F.3d 580, 587 (6th Cir. 2004), and will affirm if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact" as to an essential element of the non-moving party's case. *Id.* (citing Fed. R. Civ. P. 56(c)). "Genuine" issues are those which could persuade a reasonable person to return a verdict for the non-moving party. *Id.*

## III.

## *DISCUSSION*

### 1. *The PDA Claim*

Congress amended Title VII in 1978 to add the PDA, which reads in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k). "[I]n using the broad phrase 'women affected by pregnancy, childbirth and [sic] related medical conditions,' the [PDA] makes clear that its protection extends *to the whole range of matters concerning the childbearing process*." H.R. Rep. 95-948, 1978 U.S.C.C.A.N. 4749, 4753 (emphasis added).

We understand that Kocak claims to have offered direct evidence of discrimination – in fact, she proceeds solely on a theory of direct evidence. We have held that a plaintiff states a PDA claim if she offers direct evidence that, in treating a plaintiff adversely, the defendant was motivated by discriminatory animus. *See Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1224 (6th Cir. 1996). Even direct evidence of discrimination is irrelevant, however, unless the alleged discrimination is because of sex. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) ("Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct was not merely tinged with offensive sexual connotations, but actually constituted '*discrimina[tion]* . . . because of . . . sex.'") (emphasis and alteration in original). Discrimination "because of sex," under the PDA, must be "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). The threshold question, therefore, is whether Kocak qualified for

protection under the PDA at the time of her application for a nursing position in May 2001.[1]

Defendant contends that Kocak is not protected by the PDA because she was not pregnant at the time of Community Health's decision not to rehire her in 2001. In support of its argument, Defendant seizes on *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000), wherein we announced the prima facie test for a claim under the PDA when a plaintiff chooses to proceed by circumstantial evidence: that "(1) *she was pregnant*, (2) she was qualified for her job, (3) she was subjected to an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision." *Id.* at 658 (emphasis supplied).

Kocak was not pregnant at the time of her 2001 application; she did not bear any children during the period of her application (in fact, she had not done so for approximately two years); and no medical conditions related to pregnancy manifested themselves during the time of her application. The district court concluded from these facts that Kocak was not protected by the PDA at the time that Community Health did not hire her.

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[1] As noted above, Kocak filed only one charge of discrimination with the EEOC, involving solely the events of May and June 2001. She did not file a similar charge for the events of January 2000. Consequently, she may rely only on the 2001 events to support her federal cause of action. *See Haithcock v. Frank*, 958 F.2d 671, 675 (6th Cir. 1992) ("[I]f a plaintiff did not first present a claim to the [EEOC], that claim may not be brought before the federal courts on appeal."). The rule for a cause of action under the Ohio analogue to the PDA is the basis for Kocak's last appellate contention and will be discussed *infra* at 9.

This was error. The Supreme Court has held that the PDA prohibits an employer from discriminating against a woman "because of her capacity to become pregnant." *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 206, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991); *see also Walsh v. Nat'l Computer Sys.*, 332 F.3d 1150, 1160 (8th Cir. 2003) ("Plaintiff asserts that she was discriminated against . . . because she is a woman who had been pregnant, had taken a maternity leave, and might become pregnant again. 'Potential pregnancy . . . is a medical condition that is sex-related because only women can become pregnant.'") (quoting *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996)). In an analogous context, we have held that an employer violates the PDA if it terminates an employee because the employee is contemplating an abortion. *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996). It stands to reason that if, under the PDA, an employee may not be terminated on the basis of her potential to have an abortion, then Kocak cannot be refused employment on the basis of her potential pregnancy.[2]

Thus, if Kocak has produced direct evidence that creates a genuine issue of material fact about whether Community Health refused to hire her because she might become pregnant

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[2] We recognize that this conclusion might appear to weaken the first element of our *Cline* test. All that is required to meet that element, however, is that a plaintiff proceeding by circumstantial evidence show that she was pregnant at some point in time (and not necessarily at the time of the adverse employment action complained of). We expressly decline to consider the question of whether a plaintiff who had never before been pregnant could sue under the PDA.

again, her PDA claim survives summary judgment. She has not done so.

"[D]irect evidence is that evidence which, if believed, requires a conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999) (citations omitted). Once a plaintiff proffers direct evidence of discrimination, "the burden of persuasion shifts to the defendant to show that it would have [refused to hire the plaintiff] had it not been motivated by discrimination." *Id.* The evidence upon which Kocak purports to rely derives exclusively from her own deposition. Of the testimony concerning Community Health's failure to hire her in 2001, only two allegations are conceivably material: (1) that Finnegan told her at some point that Meyer did not want to hire her because of the scheduling difficulties attending her prior pregnancy; and (2) that Finnegan asked her whether she was pregnant or intended on having more children.

The first of these allegations is not direct evidence of discrimination – it does not require a conclusion that unlawful discrimination motivated the decision not to rehire Kocak. There is unrefuted evidence that Kocak was unreliable when it came to scheduling and difficult to contact when she was employed with Community Health, including before she became pregnant. To conclude that the obstetric unit manager's comment about scheduling difficulties relating to her last pregnancy demonstrates an anti-pregnancy animus and not a non-discriminatory concern about Kocak's past scheduling difficulties – difficulties extending further back than the pregnancy – requires an inference. *See Johnson v. Kroger Co.*, 319 F.3d 858, 865 (6th Cir. 2003) ("Direct evidence of discrimination does not require a factfinder to

draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group."). Finnegan's statement therefore does not rise to the level of "direct evidence" of discrimination. *See Norbuta v. Loctite Corp.*, 1 Fed. Appx. 305, 313 (6th Cir. 2001) (unpublished table decision) ("Whatever the strength of [the] evidence, it is not 'direct' evidence [if] it admits more than one plausible interpretation, and requires a significant inference or presumption on the part of the trier of fact."); *cf. Weigel v. Baptist Hosp. of East Tennessee*, 302 F.3d 367, 382 (6th Cir. 2002) (plaintiff did not present direct evidence of discrimination supporting ADEA claim even when those responsible for refusing to rehire plaintiff admitted that they considered her prior complaints, including age discrimination-related complaints, in their decision).

Even, however, if this statement were deemed "direct evidence" of discrimination, Community Health has offered substantial evidence that it would have decided not to rehire Kocak absent the discriminatory motive. *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 584 (6th Cir. 2003). That is, Defendant has produced evidence that it decided not to rehire Kocak because she was an unreliable employee and was avidly disliked by her peers. Kocak has not proffered a single piece of evidence indicating that these reasons are pretextual. To the contrary, portions of her testimony confirm that she was at times difficult to contact and had frequent conflicts with her co-workers.

Kocak is left to argue that when Finnegan asked her whether she was pregnant or intended on having more children, that question is "direct evidence" of discrimination. As inappropriate and unprofessional as it was, however, Finnegan's question, standing alone, cannot support Kocak's

claim. In a similar context, we have held that the question, "What? Are you pregnant?" when uttered by the person directly responsible for failing to promote a plaintiff, is insufficient standing by itself to found a claim of discrimination. *Richmond v. Johnson*, 134 F.3d 372, [published in full-text format at 1997 U.S. App. LEXIS 36574] 1997 WL 809962, at *2 (6th Cir. Dec. 18, 1997) (unpublished table decision). Certain comments can be "too abstract, in addition to being irrelevant and prejudicial, to support a finding of [pregnancy] discrimination." *Chappell v. G.T.E. Prods. Corp.*, 803 F.2d 261, 268 n.2 (6th Cir. 1986). Finnegan's question is not direct evidence of discrimination because it does not compel a reasonable factfinder to conclude that Kocak was not hired for discriminatory reasons. *Cf. Laderach v. U-Haul of Northwestern Ohio*, 207 F.3d 825, 829 (6th Cir. 2000) (direct evidence of sex discrimination consisted of testimony that defendant stated that he would not promote plaintiff because of her sex and did not want plaintiff to answer the telephone hotline because "women are not mechanically inclined").

In consequence, though Kocak falls within the protection of the PDA, we cannot say that she has raised a genuine issue of material fact with respect to her claim of discrimination under the PDA.

**2. *The Ohio State Law Claim***

Kocak also brings a claim pursuant to Ohio Rev. Code Ann. § 4112.01(B), Ohio's analogue to the PDA.[3] "Federal case law interpreting Title VII . . . is generally applicable to cases involving alleged violations of R.C. § 4112." *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n*, 66 Ohio St. 2d 192, 421 N.E.2d 128, 131 (Ohio 1981).

Kocak claims that the district court improperly excluded pre-2001 evidence of pregnancy discrimination. She alleges that the district court erred in holding that only exhausted claims could be raised in an action under R.C. § 4112, and that it should have considered Kocak's year 2000 evidence as a separate claim for pregnancy discrimination. Kocak relies on R.C. § 4112.99, which provides that violations of Ohio's discrimination statute can form the basis of a civil action.

We reject the claim. Kocak's complaint mentions solely the events of 2001 as grounds for her claims under Ohio and federal law. The complaint does not set forth a single allegation of discrimination that pre-dates 2001, let alone aver a separate claim under section 4112.99 for pre-2001 allegations. Since filing with the OCRC generally precludes a subsequent suit under section 4112.99, *see Balent v. Nat'l Revenue Corp.*, 93 Ohio App. 3d 419, 638 N.E.2d 1064,

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[3] R.C. 4112.01(B) provides in relevant part:

> . . . [T]he terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions . . . .

1066-67 (Ohio App. 1994), and since only the 2001 events are claimed as the basis for the allegation of discrimination, Kocak's claims under the Ohio Civil Rights statute fail. *See Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 431 (6th Cir. 2004).

**AFFIRMED.**

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

**No. 03-4650**

**[Filed March 11, 2005]**

| | |
|---|---|
| SUZANNE D. KOCAK, | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| v. | ) |
| COMMUNITY HEALTH PARTNERS | ) |
| OF OHIO, INC., | ) |
| Defendant-Appellee. | ) |
| | ) |

BEFORE: SILER, SUTTON, and FARRIS, Circuit Judges.

Appeal from the United States District Court
for the Northern District of Ohio
at Cleveland
No. 02-02027
Patricia A. Gaughan, District Judge

**JUDGMENT**

**THIS CAUSE was heard on the record from the district court and was argued by counsel.**

**IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.**

**ENTERED BY ORDER OF THE COURT**

/s/ _____
Leonard Green, Clerk

## APPENDIX D

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**CASE NO. 1:02 CV 2027**

**[Filed November 25, 2003]**

| | |
|---|---|
| Suzanne D. Kocak, | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| Community Health Partners | ) |
| of Ohio, Inc., | ) |
| Defendant. | ) |
| | ) |

JUDGE PATRICIA A. GAUGHAN

**Memorandum of Opinion and Order**

**Introduction**

This matter is before the Court upon defendant's Motion for Summary Judgment (Doc. 21). This case involves alleged pregnancy discrimination when plaintiff sought to be rehired by defendant. For the following reasons, the Motion is GRANTED.

**Facts**

Plaintiff, Suzanne D. Kocak, filed this Complaint against defendant, Community Health Partners of Ohio, Inc. Beginning in 1992, plaintiff was employed by defendant as a registered nurse in the obstetrics department on PRN ("as needed") basis. She subsequently converted to a part-time schedule and then back to PRN. Around September 1998, she again went to a part-time status. (pltf. depo. 8-14). Elizabeth Finnegan was defendant's program director of Women's and Children's Services. Melanie Meyer was the manager responsible for the daily operations of plaintiff's unit. (Finnegan depo. 15-16).

In November 1998, plaintiff was pregnant and was working around 24 hours per week. At this time, she presented Meyer and Finnegan with two notes from her doctor. The first indicated that plaintiff should work no more than eight hours per shift. The second indicated that plaintiff should work no more than 16 hours per week. Defendant accommodated the requests. (Finnegan depo. 30; pltf. depo. 30-32, Exs. A and B). Plaintiff's doctor then stated in a note that plaintiff had "no restrictions at work as of 12-31-98." (pltf. depo. Ex. C). A fourth note from plaintiff's doctor, dated December 29, 1998, states, "light duty until 34 weeks-March 10, 1999." (*Id.* Ex. D).

By letter of January 22, 1999, plaintiff voluntarily resigned her employment with defendant, stating, "This letter will serve as my two week notice of resignation from my part-time night shift position. It is my intention to return to a 'prn' status with [defendant.]" (*Id.* Ex. G). Plaintiff presented this letter to Finnegan and Meyer. Plaintiff testified that she resigned due to "complications of pregnancy." (pltf. depo. 67-68).

Plaintiff testified that in January 2000 she applied for a pediatric PRN position with defendant and that during a telephone conversation with Finnegan, plaintiff learned that Melanie Meyer was displeased with plaintiff's prior pregnancy complications and how they affected the schedule. By letter of February 8, 2000 to Melanie Meyer, plaintiff "stated her side" of certain "issues" that were apparently raised by Finnegan regarding incidents at work and with coworkers. (*Id.* 82- 94, Ex. I). Plaintiff was presumably not interviewed and was not hired for the position.

In May 2001, plaintiff again submitted an application for employment to defendant for a PRN position in the pediatrics department. (*Id.* 125, Ex. K). Finnegan testified that after plaintiff had applied, she undertook an investigation "because nobody wanted me to hire her back." (Finnegan depo. 63). Melanie Meyer came to Finnegan and said that plaintiff should not be rehired. Finnegan also spoke with three physicians who were the primary caregivers at that time who indicated that plaintiff was argumentative, a know-it-all and impossible at times. Finnegan made the decision that she "didn't need the chaos in my department." (*Id.* 63-64). Christine Rein, a nurse employed by defendant, avers that she expressed her opinion to Finnegan. She avers that when she learned in May 2001 that plaintiff had applied to return to work in the pediatrics department, she was upset. Plaintiff was difficult to work with, not a team worker and put her own self interests ahead of patients and co-workers. Rein stated that she felt she could not work with plaintiff and would consider leaving defendant's employ if she were hired. (Christin Rein aff.). Pamela Miller, also a nurse employed by defendant, avers that she likewise expressed her opinion to Finnegan that plaintiff was not a team worker and put her self interests first. Miller states that she felt she could not work with plaintiff. (Pamela Miller aff.). Finally, Kathy Smith, also

a nurse employed by defendant, avers that she expressed her opinion to Finnegan that plaintiff possessed these same negative characteristics and that she did not want to work with plaintiff again. (Kathy Smith aff.).

Finnegan testified that plaintiff was not rehired at this time because

> It caused quite a stir in my department. Apparently the application was made and my manager was notified and I don't know exactly who said something first or when it happened but I was told that this employee has caused in her employment history a lot more than I knew and maybe I didn't have trouble with her but a lot of people did, and they didn't like working with her, and I can give adjectives because I talked to some people.
>
> . . .
>
> That she was not a team player, that even when asked she didn't help, she was a know-it-all, self-centered, caused conflict. Some of the other things that were said, that she basically wasn't a nice person.

(Finnegan depo. 59-60).

Melanie Meyer testified that she told Beth Weinhardt, defendant's nurse recruiter, that she "did not wish to rehire" plaintiff. Meyer testified that she had extreme difficulty contacting plaintiffby telephone for purposes of requesting her to work a shift. Meyer stated, "In my best judgment, I did not want to rehire someone that I had difficulty coming in to work for me to begin with." (Meyer depo. 27, 28).

Plaintiff testified that about one month after submitting the application, she visited Finnegan in her office and that Finnegan said, "I'm not supposed to ask you this but, are you pregnant," and that plaintiff "told her, no." Plaintiff further testified, "And then [Finnegan] asked me if I was planning on having anymore [sic] children." (pltf. depo. 126). Plaintiff also testified that upon later inquiring of Finnegan as to the open position, Finnegan told her that Melanie Meyer did not want to hire her because of the previous "pregnancy issues." (*Id.* 170-171).

Plaintiff filed a Charge of Discrimination with the Ohio Civil Rights Commission (OCRC) and Equal Employment Opportunity Commission (EEOC) in September 2001. Plaintiff asserted discrimination based on sex and stated that in June 2001 she attempted to return to work but was denied hire. Plaintiff further stated that she believed she was discriminated against "due to my previous condition of pregnancy." (Compl. Ex. A). Plaintiff received a notice of dismissal and right to sue by the EEOC. Therein, it was stated, "The EEOC has adopted the fmdings of the state or local fair employment practices agency that investigated this charge." (Compl. Ex. B).

Plaintiff thereafter filed this Complaint. Plaintiff alleges that in the Spring of 2001 when she applied for a PRN position with defendant, her former supervisor asked her whether she was planning on having any more children. Plaintiff asserts that despite the availability of positions, she was denied a position on the basis of her sex. The Complaint sets forth two claims. Count One asserts sex discrimination in violation of Ohio Revised Code § 4112.01. Plaintiff alleges that defendant's actions were "sexually based and were premised on [its] fear that plaintiff, a female, would conceive

other children and thereby create problems with scheduling." Count Two asserts sex discrimination in violation of Title VII.

This matter is now before the Court upon defendant's Motion for Summary Judgment.

**Standard of Review**

Summary Judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (citing Fed. R. Civ. P. 56(c)); *see also LaPointe v. UAW, Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The burden of showing the absence of any such genuine issues of material facts rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits," if any, which it believes demonstrates the absence of a genuine issue of material fact.

*Celotex*, 477 U.S. at 323 (citing Fed. R. Civ. P. 56(c)). A fact is "material only if its resolution will affect the outcome of the lawsuit." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party. Federal Rule of Civil Procedure 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party

> may not rest upon the mere allegations or denials of [his] pleadings, but [his response], by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

The court must afford all reasonable inferences and construe the evidence in the light most favorable to the nonmoving party. *Cox v. Kentucky Dep't. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995) (citation omitted); *see also United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 562 (6th Cir. 1985). However, the nonmoving party may not simply rely on its pleading, but must "produce evidence that results in a conflict of material fact to be solved by a jury." *Cox*, 53 F.3d at 150.

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of his case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th Cir. 1995) (citing *Celotex*, 477 U.S. at 322). Accordingly, "the mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (quoting *Anderson*, 477 U.S. at 52 (1986)). Moreover, if the evidence is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summaryjudgrnent. *Anderson*, 477 U.S. at 249-50 (citation omitted).

**Discussion**

Plaintiff's brief makes clear that she bases her claim on the Pregnancy Discrimination Act (hereafter, PDA) and its state counterpart. (*See* Doc. 26 at 5,6, 15)[1].

Title VII of the Civil Rights Act of 1964 states that it shall be an unlawful employment practice for an employer to refuse to hire an individual based on sex. 42 U.S.C. § 2000e-2(a)(1). The Sixth Circuit has recognized,

> Congress enacted the Pregnancy Discrimination Act in 1978, amending Title VII to specify that 'sex' discrimination includes discrimination on the basis of pregnancy. 42 U.S.C. § 2000e(k). A claim under the PDA must be analyzed in the same manner as any other sex discrimination claim brought under Title VII.

*Hensley v. Boddie-Noell Enterprises, Inc.*, No. 98-6125, 2000 WL 799781 (6th Cir. June 14, 2000) (citations omitted). Therefore, the PDA is a part of Title VII's prohibition on

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[1] In particular, plaintiff cites to the PDA, and its Ohio counterpart. Plaintiff also recognizes that federal law interpreting Title VII is applicable to cases involving an alleged violation of Ohio Revised Code § 4112 and quotes case law that "federal law is especially relevant here, since [the Ohio counterpart] reads almost the same as the [PDA], which amended Title VII by expressly prohibiting discrimination on account of pregnancy." (Doc. 26 at 5, 6). Plaintiff further asserts that she has direct evidence of pregnancy discrimination and the provisions of the PDA do not "require that one be pregnant at the time that one experiences the adverse action." (*Id.* 15). Plaintiff also refers to the EEOC's interpretive guidelines discussing pregnancy discrimination. (*Id.*).

employment practices which discriminate on the basis of sex. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 668 (6th Cir. 2000) (citations omitted) ("Congress manifested its belief that discrimination based on pregnancy constitutes discrimination based on sex.")

"Like any Title VII case, a pregnancy discrimination claim in which the plaintiff does not claim to have direct evidence of the discrimination is analyzed under the *McDonnell Douglas* evidentiary framework, which requires that the plaintiff first establish a prima facie case of discrimination." *Prebilich-Holland v. Gaylord Entertainment Co.*, 297 F.3d 438, 442 (6th Cir. 2002). A prima facie case of pregnancy discrimination is established when the plaintiff shows "that (1) she was pregnant, (2) she was qualified for her job, (3) she was subjected to an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision." *Id.* (citations omitted) and *Cline*, 206 F.3d 668. Once the prima facie case has been made, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. "Once the defendant satisfies this burden, the presumption of intentional discrimination no longer exists and the employee must then prove by a preponderance of the evidence that the defendant intentionally discriminated against plaintiff by showing that the legitimate reasons offered by the employer were mere pretext." *Hensley*, *supra*.

Claims for pregnancy discrimination brought under Ohio law are analyzed in the same manner:

> Ohio courts utilize the same *McDonnell Douglas* analysis described *supra* when analyzing discrimination claims brought under the Ohio Civil Rights Act, Ohio Rev.Code Ann. § 4112. *See Ohio*

> *Civil Rights Comm'n v. Ingram*, 69 Ohio St.3d 89, 630 N.E.2d 669, 672 (1994) (holding that federal caselaw interpreting and applying Title VII is generally applicable to cases involving Chapter 4112); *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n*, 66 Ohio St.2d 192, 421 N.E.2d 128, 131-32 (1981) (applying *McDonnell Douglas*).

*Cline*, 206 F.3d at 668.

Plaintiff asserts that she has direct evidence of pregnancy discrimination. "Direct evidence is evidence that if believed requires the conclusion that unlawful discrimination was at least a motivating factor." *Cushman-Lagerstrom v. Citizens Ins. Co. of America*, 72 Fed.Appx. 322, 331 (6th Cir. July 30, 2003) (citations omitted). "For example, racial slurs by a decisionmaker constitute direct evidence that is sufficient to get the plaintiffs case to a jury." *Id.* Direct evidence obviates the need to establish a prima facie case through circumstantial evidence. "Once there is credible direct evidence, the burden of persuasion shifts to the defendant to show that it would have terminated the plaintiff's employment had it not been motivated by discrimination." *Lautermilch v. Findlay City Schools*, 314 F.3d 271, 275 (6th Cir. 2003).

Plaintiff points to the following testimony which she asserts constitutes direct evidence of discrimination. Plaintiff testified that in January 2000, after she submitted an application for a PRN position in the pediatrics department, Finnegan told plaintiff that Melanie Meyer was displeased with her prior pregnancy complications and how they affected the schedule and that they did not want to deal with that again. Plaintiff further testified that after submitting her application again in May 2001, Finnegan informed plaintiff

that Meyer had issues with plaintiff's prior pregnancy. Plaintiff asserts that, if believed, Meyer's statement requires the conclusion that plaintiff's prior pregnancy and its effects were at least a motivating factor in Meyer's refusal to hire plaintiff.

For the following reasons, the Court does not find that plaintiff has demonstrated direct evidence of pregnancy discrimination.

It is undisputed that plaintiff was not pregnant when she sought to be hired in May 2001.[2]

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[2] Plaintiff asserts that because defendant's Motion addresses only plaintiff's May 2001 application, defendant's denial of plaintiff for rehire in January 2000 remains at issue. Plaintiff asserts that her Complaint alleges that defendant "engaged in a series of acts" and that she may still bring a state law claim based on the January 2000 decision. The Court disagrees. Plaintiff's Charge of Discrimination with the OCRC and EEOC challenges only defendant's decision not to hire plaintiff in June 2001. The EEOC's notice of dismissal and right to sue states that it has adopted the findings of the state agency. Additionally, plaintiff's Complaint herein alleges that she applied for a PRN position in the Spring of 2001 and was not hired. Therefore, plaintiff has exhausted her administrative remedies only as to the May 2001 application for hire.

Furthermore, 42 U.S.C. § 2000e-5(e) requires that a discrimination charge be filed within 300 days after the alleged unlawful employment practice occurred. Reed v. ADM/ARTCO, 57 Fed.Appx. 682, 683 (6th Cir. Feb. 6, 2003). Thus, plaintiff's September 2001 Charge of Discrimination could only challenge the 2001 decision and not the January 2000 decision.

The amendment to Title VII, known as the PDA, provides that "women affected by pregnancy, childbirth, or related medical condition shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work..." 42 U.S.C. § 2000e(k).

Whether plaintiff is proceeding under the direct method or circumstantial method of proof, plaintiff must still show that defendant discriminated against her on the basis of her pregnancy. Plaintiff asserts that "the fact that plaintiff was not pregnant at the time she sought employment is of no consequence" because the statute's language does not require that one be pregnant at the time of the adverse action but only that the treatment be based, in part, on one's prior pregnancy. (Doc. 26 at 15). Based on recent case law, the Court disagrees.

In *Miller v. American Family Mut. Ins. Co.*, 203 F.3d 997 (7th Cir. 2000)[3], plaintiff met with her supervisor to discuss a raise. The court found the decision maker's comment that plaintiff would not get into the mid-range salary category until she "stopped having kids" was not considered direct evidence because plaintiff conceded that she did not advise her supervisors that she was pregnant until one month after the comment was made. Therefore, the court stated, "Her claim of pregnancy discrimination with respect to [this] raise cannot be based on her being pregnant if [defendant] did not know she was." *Id.* at 1006.

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[3] The Sixth Circuit relied on *Miller* in *Prebilich-Holland*, *supra*.

Thus, assuming that Finnegan and Meyer made comments regarding plaintiff's prior pregnancy, they cannot be considered direct evidence of pregnancy discrimination as they were not based on plaintiff *being* pregnant.

Cases based on the circumstantial method require that plaintiff meet the first element of the prima facie case, i.e., that she was pregnant. This does not simply mean, as contended by plaintiff, that a decision was made based on a prior pregnancy- no matter how distant that pregnancy is. Rather, case law makes clear that an adverse employment decision must be made based on a pregnancy or effects related to pregnancy. In *Torres v. Cooperativa De Seguros De Vida De Puerto Rico*, 260 F.Supp2d 365 (D.Puerto Rico 2003), the court recognized that while "Title VII clearly encompasses conditions related to pregnancy or childbirth without requiring a strict temporal proximity between the condition and the date of termination, . . . plaintiff [bears] the burden of establishing that her condition, and the reason for her repeated absences and subsequent dismissal, were *related to* her pregnancy." (emphasis added) In *Solomen v. Redwood Advisory Co.*, 183 F.Supp.2d 748 (E.D.Pa. 2002), the court stated that a plaintiff who is not pregnant at or near the time of the adverse employment action must introduce evidence that "she was affected by pregnancy, childbirth or related medical conditions at the time of the adverse employment action." Similarly, in *Sura v. Stearns Bank*, 2002 WL 31898167 (D. Minn. 2002), the court stated, "While some effects of pregnancy linger beyond the act of giving birth, at some point the female employee is no longer affected by pregnancy, childbirth, or related medical conditions." And, "Generally, a woman's status as a new parent, standing alone, is insufficient to establish membership in the protected class for pregnancy discrimination." Finally, the court stated, "Rather, a woman who is not pregnant at or very near the time when

an adverse employment action is taken against her must demonstrate that the effects of her pregnancy continued to exist at the time she was subject to the action. . ."

Here, plaintiff does not assert that the effects of her pregnancy continued to exist at the time she sought to be rehired in May 2001. In fact, more than two years had lapsed since plaintiff voluntarily resigned due to pregnancy complications.

Plaintiff cites to *Felts v. Radio Distributing Co., Inc.*, 637 F.Supp. 299 (N.D.Indiana 1985). However, *Felts* is clearly distinguishable. In *Felts*, plaintiff commenced a medical leave for pregnancy on March 23, 1982 and subsequently notified her supervisor that she had been released to return to work on July 12, 1982 following the birth of her baby. Despite the employer's practice of permitting employees on a medical leave of absence to return to the same position following the leave, plaintiff's employer told her the company was having financial problems and there was not enough work to justify her return. Evidence showed that plaintiff's department had actually gained an employee during her leave, no positions were eliminated and the defendant had funds to build costly new offices. In the case herein, plaintiff voluntarily resigned her position. Over two years later, she sought to be rehired. Unlike the plaintiff in *Felts*, plaintiff was not seeking to return to her position following a maternity leave.

Therefore, because plaintiff was not pregnant, or suffering the effects of pregnancy or childbirth, at the time she sought to be hired in May 2001, plaintiff cannot show direct evidence of pregnancy discrimination or establish a prima facie case of pregnancy discrimination. In fact, she cannot assert a claim under the PDA.

Although this Court need not reach the issue of pretext, the Court further finds that plaintiff has failed to show pretext.

As discussed above, defendant asserts that plaintiff was not considered for hire in 2001 because of the vehement opposition by other employees to plaintiff's return to work. Thus, defendant has asserted a legitimate nondiscriminatory reason for not hiring plaintiff.

Plaintiff contends that this reason is a pretext for discrimination. First, plaintiff asserts that she has established material issues of fact demonstrating that Finnegan did not newly discover the issues with plaintiff's coworkers but that she had knowledge of such prior to May 2001. In particular, plaintiff points to her deposition testimony that in a meeting with Finnegan and Linda Neiding in early 2000, she addressed "accusations" that she had left patients unattended and problems she had with Christine Rein. Plaintiff also points to her letter of February 2000, to Meyer, wherein she addressed issues which were raised by Finnegan when plaintiff expressed her interest in returning to work. Plaintiff further points to her own testimony that she had reported an incident to Finnegan in 1998 involving one of the physicians who had given Finnegan negative feedback in 2001.

Presumably, plaintiff is arguing that Finnegan's prior knowledge of these matters undermines her credibility when she asserts that she undertook an investigation upon receiving plaintiff's 2001 application after receiving negative comments. However, even assuming Finnegan was previously aware of some of the problems plaintiff had with coworkers, this does not diminish the reason Finnegan gave for not rehiring plaintiff- coworkers complained that she was not a team

player, she was a know-it-all, self-centered and caused conflict.

Second, plaintiff asserts that Melanie Meyer actually made the decision not to hire plaintiff and, therefore, Finnegan's investigation is of no significance. Plaintiff points to Meyer's testimony that she told Weinhardt, the nurse recruiter, that she did not want to hire plaintiff.

Plaintiff also points to an internal notation made by Weinhardt in the application process indicating that Meyer told her not to interview or hire plaintiff. However, plaintiff does not create an issue of fact that Finnegan, at a minimum, did not participate in the decisionmaking process. Therefore, Finnegan's testimony as to the reasons plaintiff was not hired is relevant.

Assuming that Meyer made the decision, plaintiff attempts to discredit Meyer's explanation as to why Meyer told Weinhardt that she did not wish to hire plaintiff. Meyer stated that she had extreme difficulty contacting plaintiff by telephone for purposes of requesting her to work a shift. However, plaintiff admitted in her affidavit that Meyer had complained to her that she could not be reached at home and that this was a result of a block plaintiff had put on her telephone. Plaintiff avers that after her discussion with Meyer, she took the block off. This testimony fails to undermine Meyer's testimony that she had difficulty reaching plaintiff. Plaintiff also points to Meyer's testimony that defendant "[tried] to activate a procedure where the PRNs needed to come in at least four times a month. . . and it was difficult to get [plaintiff] to comply." Plaintiff avers that although she recalled discussions regarding this four-day requirement, she recalled that it actually became a requirement in 1999- after plaintiff's resignation. Plaintiff's

affidavit testimony fails to create an issue of fact because it does not discredit Meyer's testimony that defendant was attempting to get the nurses to work four days a month, regardless of whether it was a requirement at the time, and Meyer had difficulty getting plaintiff to do so.

For these reasons, even if the Court were to reach the issue of pretext, plaintiff has not shown that defendant's legitimate reason for not hiring plaintiff was actually a pretext for pregnancy discrimination.

**Conclusion**

For the foregoing reasons, defendant's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

## APPENDIX E

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF OHIO**
**EASTERN DIVISION**

**CASE NO. 1:02 CV 2027**

**[Filed November 25, 2003]**

| | |
|---|---|
| Suzanne D. Kocak, | ) |
| Plaintiff, | ) |
| | ) |
| v. | ) |
| | ) |
| Community Health Partners | ) |
| of Ohio, Inc., | ) |
| Defendant. | ) |
| | ) |

JUDGE PATRICIA A. GAUGHAN

**Judgment Entry**

This Court, having issued its Memorandum of Opinion and Order granting defendant's Motion for Summary Judgment (Doc. 21), hereby enters judgment for defendant.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan
PATRICIA A. GAUGHAN
United States District Judge

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## APPENDIX F

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## STATUTORY PROVISIONS INVOLVED

### TITLE 42. THE PUBLIC HEALTH AND WELFARE
### CHAPTER 21–CIVIL RIGHTS
### SUBCHAPTER VI--EQUAL EMPLOYMENT OPPORTUNITIES

**§ 2000e. Definitions**

For the purposes of this subchapter--

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

**§ 2000e-2. Unlawful employment practices**

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

**§ 2000e-5. Enforcement provisions**

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent

demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court--

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

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# In the Supreme Court of the United States

SUZANNE D. KOCAK,

*Petitioner*,

v.

COMMUNITY HEALTH PARTNERS OF OHIO, INC.,

*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Petitioner Suzanne D. Kocak ("Kocak") was employed as a nurse by Respondent Community Health Partners of Ohio, Inc. ("CHP"), in CHP's obstetrics department. Kocak's employment status was PRN (*i.e.* only as-needed on a call-in basis). She became pregnant and requested regular part-time assignment for benefits, which CHP granted her. She encountered difficulties in the pregnancy, which CHP reasonably accommodated. Then Kocak resigned her position voluntarily. Two years later she sought re-employment. CHP did not hire her because its employees, who had been Kocak's coworkers, stated they could not, and would not, work with Kocak. Kocak alleges the failure to rehire her was based on her prior pregnancy and the "fear" that she would have a difficult pregnancy in the future and present scheduling problems. Kocak's whole theory is based on an alleged isolated remark of the director of obstetrics, Elizabeth Finnegan ("Ms. Finnegan") to the effect that a supervisor had concerns about prior scheduling difficulties with Kocak (that pre-dated her pregnancy) and asked her in a conversation if she planned to have children in the future.

The Court of Appeals held that Ms. Finnegan's alleged statement about Kocak's future pregnancy and scheduling, even if assumed to have been uttered, was not "direct evidence" of discrimination. The controlling question presented by Kocak in her Petition is whether the Court of Appeals erred in this determination.

The Court of Appeals held that summary judgment was warranted because CHP provided undisputed evidence of a legitimate nondiscriminatory reason for not hiring Kocak. Kocak failed to supply any evidence that the reason was pretextual or motivated by discriminatory aniums. Kocak

asserts that summary judgment was in error because she had presented "direct evidence" of discrimination. However, this is simply the same question as the first above. The required premise is that she presented direct evidence. The Court of Appeals held that she did not.

## RULE 29 CORPORATE DISCLOSURE STATEMENT

Respondent Community Health Partners of Ohio, now known as Community Health Partners Regional Medical Center, is an Ohio not-for-profit corporation. It is a subsidiary of Community Health Partners Regional Health System, a not-for-profit Ohio corporation whose sole member is Catholic Healthcare Partners, also a not-for-profit Ohio corporation. None of these entities is a publicly-owned corporation or owned in part by a publicly-held corporation.

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### STATEMENT OF THE CASE

The U.S. Court of Appeals for the Sixth Circuit and the U.S. District Court for the Northern District of Ohio correctly adduced the pertinent, undisputed facts of this case in rendering summary judgment in favor of CHP. Kocak has attempted to frame a case of discrimination upon the fact that she was pregnant while employed at CHP several years previously. However, there are no facts supporting that her pregnancy or gender was ever a factor in anything related to her employment at CHP. Nor is it disputed that she was an uncooperative employee and difficult to work with prior to her becoming pregnant. For example, when on call, Kocak (not pregnant at the time) frequently could not be reached.

Kocak left CHP's employ voluntarily. CHP had no continuing obligation to Kocak. She was not rehired when the director of obstetrics, Ms. Finnegan, found that she was faced with a revolt by her employees if Kocak were to return to CHP's employ. Virtually no one would work with Kocak. To overcome these clear facts, Kocak attempted to create "direct evidence" of discrimination by alleging that Ms. Finnegan asked her if she intended to be pregnant again, stating that another supervisor had told Ms. Finnegan that the supervisor had concerns about the scheduling problems previously experienced with Kocak. There is no corroboration of Kocak's allegation that Ms. Finnegan said anything like this to her. Nor is Kocak very specific about what or when the statement was made.

The Court of Appeals correctly ruled that Ms. Finnegan's purported statement does not constitute direct evidence of

discrimination. The Court of Appeals also correctly found that CHP presented uncontested, nondiscriminatory reasons not to hire Kocak and that there was no evidence that these reasons were pretext for discrimination. This is appropriate application of the summary judgment standard, *viz.* that the nonmoving party has failed to come forward with evidence sufficient to create an issue of material fact. CHP carried its summary judgment burden. Kocak did not.

## REASONS FOR DENYING THE WRIT

### I. KOCAK HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for writ of certiorari will be granted only for compelling reasons." *Id.* "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

No such compelling reason is presented in the instant case. Kocak's sole argument is her insistence that her allegation of Ms. Finnegan's statement constitutes "direct evidence" of discrimination. The Court of Appeals examined the nature of the purported "direct evidence" at length and concluded that no part of the alleged comments constituted direct evidence. There is no conflict to be resolved about the definition of direct evidence. It is well-settled that such evidence must be the equivalent of a "smoking gun" requiring no inference or interpretation as an intermediate step in the thought process required to reach a conclusion that it does, or even could be, evidence discrimination. If such an inference

must be drawn to raise the possibility of discrimination, then the purported evidence is not "direct".

The sum and substance of Kocak's Petition herein is her disagreement with the Court of Appeals' opinion that Ms. Finnegan's alleged statement was not direct evidence. This is not a "compelling reason" for granting the Petition. It is a disagreement with the Court of Appeal's legal ruling on the nature of Kocak's "evidence" and its insufficiency to meet Kocak's burden in the context of summary judgment.

## II. THE LOWER COURT DID NOT ERR IN DECIDING THIS CASE.

The Court of Appeals correctly applied the rule of what constitutes direct evidence of discrimination. In this regard the Court of Appeals stated:

> We understand that Kocak claims to have offered direct evidence of discrimination – in fact, she proceeds solely on a theory of direct evidence. We have held that a plaintiff states a PDA claim if she offers direct evidence that, in treating a plaintiff adversely, the defendant was motivated by discriminatory animus. *See Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1224 (6th Cir. 1996). Even direct evidence of discrimination is irrelevant, however, unless the alleged discrimination is because of sex. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S. Ct. 998, 140 L.Ed.2d 201 (1998)("Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct was not merely tinged with offensive sexual connotations, but actually constituted

> '*discrimina[tion]*.....because of... sex.'")(emphasis and alteration in original).

[Pet'r App. B at 6a] The Court of Appeals proceeded to carefully analyze Kocak's purported direct evidence:

> The evidence upon which Kocak purports to rely derives exclusively from her own deposition. ....[O]nly two allegations are conceivably material: (1) that Finnegan told her at some point that Meyer [the other supervisor] did not want to hire her because of the scheduling difficulties attending to her prior pregnancy; and (2) that Finnegan asked her whether she was pregnant or intended on having more children.

[Pet'r App. B at 9a] Direct evidence is that which, if believed, proves the existence of an issue without inference or presumption. In examining the first allegation, the Court of Appeals correctly considered whether the statement required the intermediate step of drawing an inference as to whether the statement was probative of discrimination, and held that such an inference was required because the reference to scheduling was ambiguous and could just as easily refer to all the problems CHP had with Kocak prior to her becoming pregnant during her employment.

Similarly, the Court of Appeals determined that the second alleged statement (about her future pregnancy plans) was not sufficient to constitute direct evidence of discriminatory animus. This is in keeping with the federal courts in general and does not present a compelling issue. *See, e.g., Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1223 (11th Cir. 1996)("Only the most blatant remarks whose intent could be nothing other than to discriminate constitute direct

evidence."); *Tomsic v. State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1477-78 (10th Cir. 1996)(statements of personal opinion by supervisor about married woman's motivation to work were not direct evidence); *Kriss v. Sprint Communications Co.*, 58 F.3d 1276, 1282 (8th Cir. 1995)(statement insufficient to constitute direct evidence); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309,314 (6th Cir. 1989)("isolated and ambiguous statements," even when made by decision-maker, did not constitute direct evidence). The Court of Appeals correctly determined that Kocak's purported statements attributed to Ms. Finnegan were not direct evidence. Further, such statements were insufficient circumstantial evidence, as a matter of law, to overcome summary judgment. The amendments to the Civil Rights Act did not obliterate the summary judgment standard. Title VII evidence must still be sufficient to create a question of material fact. A mere "scintilla" is not enough. *Anderson v. Liberty Lobby,* 477 U.S. 242, 252 (1986). Naked allegations are also insufficient.

The simple truth is that CHP did not hire Kocak because she could not get along with coworkers and physicians and caused much disharmony in the workplace. Kocak's own testimony in this case corroborates Ms. Finnegan's findings that Kocak had ***personal conflicts*** with coworkers. For example, Kocak ***admitted*** that she did not get along with nurse Christine E. Rein ("Rein") and a physician. By Kocak's own admission, CHP had legitimate reasons not to hire her. Pregnancy, past or future, had nothing to do with it.

This case presents no compelling interest or conflict necessitating review. The courts below correctly held that CHP was entitled to judgment as a matter of law.

## CONCLUSION

The Petition should be denied.

Respectfully submitted,

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